STATE OF WISCONSIN

C O U R T A P P E A L S

District I

Case No. 2019 AP 000411-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

DECARLOS CHAMBERS,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION ENTERED ON SEPTEMBER 8, 2017, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED ON FEBRUARY 25, 2019, THE HONORABLE JEFFREY WAGNER PRESIDING ON BOTH MATTERS, BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

ARGUMENT.....1

I. THE RESPONDENT'S BRIEF DOES NOT ADEQUATELY REBUT APPELLANT'S ARGUMENT THAT TRIAL COUNSEL HAD VIOLATED DEFENDANT'S RIGHT TO DICTATE THE DIRECTION AND OBJECTIVES OF HIS TRIAL. THE RESPONDENT'S ARGUMENTS, AND CASE LAW, DO NOT ADEQUATELY REBUT SUCH A CONCLUSION.....

A. Contrary to the Respondent, Defendant has not Forfeited his Claim to Argue this Present Matter.....

B. Contrary to the Respondent, Trial Counsel's Conduct at Closing Argument was the Functional Equivalent of Concession of Guilt to the Lesser Included Offense. Furthermore, McCoy vs. Louisiana Does not Limit Itself to Such Situations Involving Concessions of Guilt. This United States Supreme Court Case applies Anytime Trial Counsel's Conduct Conflicts with a Defendant's Objectives with Respect to His or Her Case.....

CONCLUSION.....8

CASES CITED

Florida vs. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).....

Hoffman vs. Economy Preferred Ins. Co., 232 Wis.2d 53, 606 N.W.2d 590 (Ct. App. 1999).,.....

McCoy vs. Louisiana, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018).....

State vs. Davidson, 222 Wis.2d 233, 589 N.W.2d 38 (Ct.App. 1998), rev'd on other grounds, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606 (2000).....

State vs. Delgado, 250 Wis.2d 689, 641 N.W.2d 490 (Ct.App. 2002).....

State vs. Gordon, 262 Wis.2d 380, 663 N.W.2d 765 (2003)..

State vs. Greene, 422 S.E.2d 730 (1992).....

State vs. Harvell, 432 S.E.2d 325 (1993).....

State vs. Huebner, 235 Wis.2d 486, 611 N.W.2d 727 (2000).....

State vs. Johnson, 265 So.3d 1034 (2019).....

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REPLY BRIEF OF THE APPELLANT

ARGUMENT

I. THE RESPONDENT'S BRIEF DOES NOT ADEQUATELY REBUT APPELLANT'S ARGUMENT THAT TRIAL COUNSEL HAD VIOLATED DEFENDANT'S RIGHT TO

DICTATE THE DIRECTION AND OBJECTIVES OF HIS TRIAL. THE RESPONDENT'S ARGUMENTS, AND CASE LAW, DO NOT ADEQUATELY REBUT SUCH A CONCLUSION.

The Respondent's Brief has failed to adequately rebut the Defendant's Appellant's Brief. Contrary to the Respondent, trial counsel had violated Defendant's constitutional right to solely dictate the direction and objective of his jury trial.

A. Contrary to the Respondent, Defendant has not Forfeited his Claim to Argue this Present Matter.

The Respondent has indicated that Defendant has forfeited his present argument raised in his Appellant's Brief. This, by not timely objecting during trial counsel's closing argument. However, this indication by the Respondent is materially erroneous.

The Respondent has cited two cases for its argument. These cases are State vs. Delgado, 250 Wis.2d 689, 641 N.W.2d 490 (Ct.App. 2002) and State vs. Huebner, 235 Wis.2d 486, 611 N.W.2d 727 (2000). (Resp.Brf, page 5). However, neither of these cases assist the Respondent. They are both materially distinguishable and irrelevant to the present situation.

Both Delgado and Huebner concern situations where trial counsel had failed to timely object. Here, that is not the situation. In Delgado, defense counsel had failed to object to testimony by an expert at Delgado's jury trial. The Court of Appeals had concluded that defense counsel had a duty to object to

each specific objectionable part of that testimony, and that a standing objection was insufficient. State vs. Delgado, 250 Wis.2d 689 at 697-698.

Similarly, in Huebner, defense counsel had failed to timely object to Huebner's receipt of a six person misdemeanor jury trial. In that case, the Supreme Court had indicated that the waiver rule encourages attorneys to diligently prepare and conduct trials. As the Respondent has also quoted, the waiver rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. State vs. Huebner, 235 Wis.2d 486 at 493. Importantly, as indicated, the Respondent had quoted this very last paragraph from Huebner in its Brief. (Resp. Brf, page 6). Hence, the Respondent itself has acknowledged that the waiver rule applies solely to the conduct of trial counsel. Respondent has acknowledged that the waiver rule does not apply to a Defendant's conduct.

Here, the situation is more analogous to that in State vs. Gordon, 262 Wis.2d 380, 663 N.W.2d 765 (2003). This, although that case concerns prejudicial ineffectiveness of counsel and not a situation such as present here, the application of subsequent case law. In Gordon, on closing argument, defense counsel had argued for guilt on a disorderly conduct count. Gordon, on his own, had never objected at the time of that argument. The Supreme Court had never applied the waiver rule to Gordon's personal failure to object.

Based upon Respondent's Brief, the Respondent would submit that such personal objection by the Defendant would be necessary. Instead, the Supreme Court had simply adopted a prejudicial ineffectiveness of counsel standard. State vs. Gordon, 262 Wis.2d 380 at 383-384. Under the circumstance where a Defendant is objecting to his counsel's closing argument, the waiver rule does not apply. Counsel is deemed to be the expert.

True, the Supreme Court in Gordon had adopted the prejudicial ineffectiveness of counsel standard when defense counsel concedes guilt during closing argument. However, Defendant has not presented this case for this ruling. Defendant has simply presented Gordon to materially rebut Respondent's argument that the waiver rule applies in the present situation. This case is from 2003. Clearly, the United States ruling in McCoy vs. Louisiana, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018) has overruled that Wisconsin Supreme Court ruling. Now, as Defendant had argued in his Appellant's Brief, such a concession amounts to structural error, with automatic reversal.

Further, the Respondent has argued that a Defendant can lose his right to protest his innocence. This, if he does not indicate such innocence. The Respondent has presented the United States Supreme Court case Florida vs. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) for this proposition. However, once again, this case is materially irrelevant to the present situation. In Nixon, Nixon had been totally uncommunicative throughout the trial.

In that case, the Supreme Court had concluded that Nixon had neither consented nor objected to his counsel's strategy of conceding guilt. Counsel had attempted multiple times to discuss the strategy of conceding guilt with Nixon. However, he had remained non-responsive, never verbally approving nor protesting the proposed strategy. Counsel had no guidance from Nixon as to Nixon's position on that issue. Hence, without a response from Nixon, the United States Supreme Court had found no fault on the part of trial counsel. Florida vs. Nixon, 543 U.S. 175 at 181, 192.

In the present situation, contrary to Nixon, trial counsel had been well aware that Defendant was protesting his innocence. The trial court had also been so aware. As indicated in Appellant's Brief, counsel had, on multiple occasions, indicated that the Defendant would not plead guilty to anything. According to counsel, he did not do the charged conduct. (App. Brf, page 7). Furthermore, as indicated in Appellant's Brief, the Defendant had specifically rejected pleading guilty to the very same charge that trial counsel had urged the jury to "consider" during her closing argument. Hence, unlike the situation in Nixon, counsel in the present situation had been thoroughly aware of Defendant's position in this present matter. He had made his position crystal clear throughout the entire case; that he was innocent and that pursuit of acquittal was the sole objective. Contrary to the Respondent, trial counsel had materially ignored this position.

Furthermore, unlike the situation in Nixon, the United States Supreme Court in that case had found crucial that Nixon's lawyer had attempted to discuss his strategy with Nixon. The Supreme Court had indicated that an attorney has a duty to discuss important decisions with the client. Id. At 189, 192.

In the present situation, unlike Nixon, trial counsel had failed in her duty to discuss her closing argument with the Defendant. There is no indication in the trial transcript that such a discussion had ever occurred. As indicated in Appellant's Brief, Defendant has submitted a sworn Affidavit that no such discussion had ever occurred. He had never authorized her to make any argument other than that he did not commit the crime and was innocent.(App. Brf, pges 9-10). Hence, trial counsel had violated her duty, enunciated in Nixon, that she discuss such matters, as is the crux of this present appeal, with the Defendant. This, prior to her making her closing argument.

Based upon the foregoing, the Respondent has materially erred in indicating that Defendant had forfeited his right to present his argument at issue in the present appeal. This Court should reject this indication.

B. Contrary to the Respondent, Trial Counsel's Conduct at Closing Argument was the Functional Equivalent of Concession of Guilt to the Lesser Included Offense. Furthermore, McCoy vs. Louisiana Does not Limit Itself to Such Situations Involving Concessions of Guilt. This United States Supreme Court Case applies Anytime Trial Counsel's Conduct Conflicts with a Defendant's Objectives with

Respect to His or Her Case.

The Respondent has cited three separate non-Wisconsin cases. This, to support its position that counsel's conduct during Closing Arguments did not concede guilt. However, these three cases are materially distinguishable and irrelevant to the present situation. These cases are State vs. Harvell, 432 S.E.2d 325 (1993); State vs. Greene, 422 S.E.2d 730 (1992); and State vs. Johnson, 265 So.3d 1034 (2019). The first two cases are from North Carolina. The last case is from Louisiana.

In Harvell, the trial counsel did not urge the jury to consider any specific charge in closing argument. Instead, the trial counsel had argued that Harvell had not been guilty of first or second Degree Murder. Instead, trial counsel had indicated to the jury that, based upon the evidence presented, voluntary manslaughter had been the offense most resembling the evidence, being that there had been provocation. Unlike the present situation, counsel had never argued that the jury should consider voluntary manslaughter. Further unlike the present situation, counsel in Harvell had never discussed the specific facts of the charged conduct during closing arguments. State vs. Harvell, 432 S.E.2d 325. Here, such discussion had occurred before the jury, as indicated in Appellant's Brief. (App.Brf, page 9). This, as part of counsel's closing argument when she had urged the jury to "consider" convicting the Defendant of the lesser included offense.

Similarly, in Greene, trial counsel had never argued that the jury should consider convicting the Defendant of any lesser included offense. In that case, counsel had argued some of the facts as not having supported first degree murder. However, counsel had argued that the facts did not support first degree murder, more supported a manslaughter type, but that "I don't say that you should find that." State vs. Greene, 422 S.E.2d 730 (1992). There had not been any discussion that the jury should consider convicting Greene of a lesser included offense, much less how the facts had supported such a conviction of a lesser included. Counsel had also specifically told the jury not to consider the lesser included.

Finally, in Johnson, Johnson had argued that his counsel had conceded guilt to the substantive original charge, that of second degree murder, during closing arguments. However, the Supreme Court of Louisiana had found that counsel had made no such argument. Instead, counsel had argued for voluntary manslaughter, a lesser included. Johnson had never made the argument that he was totally innocent, or that he was objecting to this argument for the lesser included. Also, unlike here, the Louisiana Supreme Court had found persuasive that Johnson had never objected to such an argument for the lesser included. State vs. Johnson, 265 So.2d 1034 (2019). Here, unlike Johnson, Defendant's clear objective had been for absolute innocence, and absolute acquittal. He had specifically

rejected pleading guilty to the lesser included. He had made his wishes clear to the court and his counsel. Hence, Johnson is inapplicable to the present situation.

Here, as argued in Appellant's Brief, asking the jury to "consider" the lesser included offense of Second Degree Reckless Homicide is not an argument for an acquittal. Instead, such an argument is for the jury to consider convicting the Defendant of such a lesser included offense. Further, counsel had provided facts to the jury to support such "consideration" of such a conviction. Counsel's conduct had been tantamount to arguing for, and urging, conviction of the lesser included offense. Contrary to the Respondent, McCoy vs. Louisiana expressly prohibits such an argument.

Furthermore, McCoy vs. Louisiana goes farther then limiting itself to concessions of guilt. The Respondent has failed to discuss, or even argue against, these additional prohibitions. McCoy also prohibits counsel from any conduct that violates a Defendant's Sixth Amendment right to determine the "objective of his defense." A Defendant has the autonomy to decide that the objective of the defense is solely to assert innocence. McCoy vs. Louisiana, 138 S.Ct. 1500 at 1508. Defense counsel could not interfere with McCoy's telling the jury "I was not the murderer." Id. At 1509. When counsel is presented with express statements of the client's will to maintain innocence, as trial counsel here had

been presented, counsel may not steer the ship the other way. Id. At 1510. Such language goes farther than a "concession of guilt." Such language prohibits any interference with a Defendant's sole, announced, objective of having his counsel tell the jury that he was not the murderer. Here, as argued, counsel's conduct of urging the jury to "consider" a conviction of a crime clearly violates such a prohibition.

In his Appellant's Brief, Defendant had presented the McCoy law that a counsel must not violate a client's objective of his defense. Defendant had indicated that McCoy, as in his personal situation, mandates only arguments for acquittal. He had indicated that his trial counsel had failed to argue for acquittal throughout his entire trial, as mandated by McCoy. Defendant had indicated that McCoy requires that, when a Defendant asserts innocence, then a trial counsel must fully abide by that assertion. This assertion is solely Defendant's decision, not counsel's. Counsel must not override this assertion in any way. (App.Brf, pges 19-20). As indicated, Respondent has failed to address, much less attempt to rebut, such law announced in McCoy. Failure to respond to arguments raised by the appellant amounts to a confession that they are sound. Hoffman vs. Economy Preferred Ins. Co., 232 Wis.2d 53, 606 N.W.2d 590 (Ct. App. 1999); State vs. Davidson, 222 Wis.2d 233, 589 N.W.2d 38 (Ct.App. 1998), rev'd on other grounds, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606 (2000).

Here, as argued in Appellant's Brief, counsel's invitation for the jury to "consider" a conviction of the lesser included offense had essentially been an invitation to convict the Defendant of this lesser included offense. Such a conclusion is clear and obvious. Counsel's request to "consider" had not been an argument for acquittal, as mandated by McCoy. Furthermore, counsel had specifically argued facts to justify this "consideration" of the lesser included. Here, trial counsel had specifically violated McCoy's requirement that, under his situation, counsel had a legal duty to not make any argument outside of acquittal. Further, such conduct amounts to structural error. A new jury trial is mandated. Respondent's arguments fail to adequately and materially rebut such a conclusion. These arguments must be rejected.

CONCLUSION

As indicated within this Reply Brief and within Appellant's original Brief, the trial court had erred in denying Defendant's Postconviction Motion. Trial counsel's conduct had violated the requirements, restrictions, and mandates of McCoy vs. Louisiana. Such conduct is structural error. A new jury trial is mandated.

Dated this 7th day of August, 2019.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. DeCarlos Chambers, 2019 AP 000411 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is twelve (12) pages.

Dated this 7th day of August, 2019, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. DeCarlos Chambers, Case No. 2019 AP 000411 CR is identical to the text of the paper brief in this same case.

Dated this 7th day of August, 2019, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant